South Carolina Law Review

Volume 49
Issue 5 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 9

Summer 1998

# Employment Law

# COLLATERAL ESTOPPEL AND EMPLOYMENT SECURITY COMMISSION DECISIONS: STUNTED EFFORTS TO MINIMIZE LITIGATION COSTS

## I. INTRODUCTION

In *Shelton v. Oscar Mayer Foods Corp.*[1] the Supreme Court of South Carolina held that the judicially created doctrine of collateral estoppel should not be applied to prevent the relitigation of issues previously decided in Employment Security Commission (ESC) hearings.[2] In so holding, South Carolina joined the ranks of numerous other jurisdictions that similarly refuse to extend a preclusive effect to decisions made at unemployment compensation hearings.[3]

After briefly describing the doctrine of collateral estoppel, this Note examines why South Carolina refused to extend a preclusive effect to ESC decisions. The analysis continues by contrasting the arguments asserted by courts and commentators concerning whether collateral estoppel should be applied to decisions made at unemployment compensation hearings. The Note concludes by suggesting that the rule in *Shelton* should be applied only in cases involving the use of offensive collateral estoppel.

## II. AN EXPLANATION OF COLLATERAL ESTOPPEL

Collateral estoppel, or issue preclusion, is a judicially created doctrine that prevents the relitigation of issues previously decided between the same parties or their privies.[4] Because the doctrine is applied when a prior judicial tribunal has resolved a fully litigated issue, litigants use collateral estoppel to obtain summary judgment on that decided issue.[5] Collateral estoppel offers several advantages both

---

1. 325 S.C. 248, 481 S.E.2d 706 (1997).
2. *Id.* at 254, 481 S.E.2d at 709.
3. *See id.* at 253-54, 481 S.E.2d at 708-09 (citing Kelley v. TYK Refractories Co., 860 F.2d 1188 (3d Cir. 1988); Caras v. Family First Credit Union, 688 F. Supp. 586 (D. Utah 1988); Salida Sch. Dist. R-32-J v. Morrison, 732 P.2d 1160 (Colo. 1987) (en banc); Board of Educ. v. Gray, 806 S.W.2d 400 (Ky. Ct. App. 1991); Shovelin v. Central N.M. Elec. Coop., 850 P.2d 996 (N.M. 1993); Case v. Lower Saucon Township, 654 A.2d 57 (Pa. Commw. Ct. 1995)).
4. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).
5. *See, e.g.*, Bennett v. South Carolina Dep't of Corrections, 305 S.C. 310, 408 S.E.2d 230 (1991)

to litigants and to the judicial system. First, the doctrine promotes judicial economy[6] by saving the parties the expense of relitigating decided issues.[7] Second, by eliminating the possibility of a second judicial tribunal resolving the identical issue differently, collateral estoppel encourages litigants to rely on the court system because it provides for greater consistency in judicial decisions.[8] Finally, the doctrine promotes comity throughout the United States judicial system because it encourages federal and state courts to mutually recognize the validity of decisions made in the other court system.[9]

Collateral estoppel may be used both defensively and offensively.[10] Defensive collateral estoppel prevents a *plaintiff* from relitigating an issue that the plaintiff lost in a prior adjudication.[11] Offensive collateral estoppel precludes the relitigation of issues that were decided against a *defendant* in an earlier proceeding.[12] To demonstrate how collateral estoppel is applied, suppose that a husband and wife, riding in one automobile, were involved in a car accident with another automobile. Suppose further that the driver of the latter car was acting within the scope of his employment at the time the accident occurred. Accordingly, privity authorizes either the husband or wife or both to sue not only the employee/driver but also the employee's employer as potential defendants. If the husband brought an action exclusively against the driver of the other automobile and the court specifically found that the defendant driver did *not* negligently cause the accident, defensive collateral estoppel would preclude the husband from relitigating the issue of negligence against the driver's employer. In this regard, defensive collateral estoppel conserves judicial resources because it encourages plaintiffs to join all potential defendants in the first lawsuit.[13] A loss against one defendant could preclude the plaintiff from subsequently litigating the issue and recovering damages against another defendant in privity.

If instead, in the husband's lawsuit against the defendant driver, the court found that the driver negligently caused the accident, the driver would be precluded by offensive collateral estoppel from relitigating the issue of his negligence in a suit initiated by the wife. The wife could use offensive collateral estoppel to recover damages from the defendant driver without relitigating the issue of the defendant's negligence. Rather than conserving judicial resources, offensive collateral estoppel

---

(holding that summary judgment in favor of the State agency was appropriate because collateral estoppel barred the aggrieved employee from relitigating decided issues).

6. *Parklane Hosiery*, 439 U.S. at 326.

7. Allen v. McCurry, 449 U.S. 90, 94-96 (1980).

8. *Id.*

9. *Id.* at 95-96.

10. *Parklane Hosiery*, 439 U.S. at 329.

11. *Id.*

12. *Id.*; *see also* Beall v. Doe, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984) (accepting the application of nonmutual offensive collateral estoppel).

13. *Parklane Hosiery*, 439 U.S. at 329-30.

encourages plaintiffs to initiate separate lawsuits.[14] A plaintiff may be able to take advantage of a prior judgment without being bound by the judgment if the defendant wins.[15] In the car accident example, the wife, in a subsequent lawsuit, would be able to profit from the husband's victory against the defendant. Had her husband lost, she would not be bound by a decision against the husband. In other words, if the defendant driver won the first suit against the husband, the defendant driver would not be able to bind the wife to this decision because collateral estoppel is only available when the party *against whom* it is being asserted was a party or that party's privy in the prior adjudication.[16] Because the husband and wife are not in privity in this example, the wife may not be bound by a decision adverse to the husband. The wife would benefit from initiating her own lawsuit because she may be able to recover against the defendant driver either by taking advantage of her husband's earlier victory or by relitigating the issue of the defendant's negligence.

Offensive collateral estoppel may be unfair to a defendant.[17] A defendant may have had little incentive to fully litigate the issue in the initial action.[18] Again, using the car accident example, suppose that the husband sustained only minor injuries from the impact. Damages in his personal injury action may be valued at $5,000. Suppose further that the wife had sustained severe bodily harm. Damages in her personal injury action against the defendant driver may be valued at $50,000. Clearly, the defendant would have a greater incentive to fully litigate the issue of negligence in the second lawsuit when liability for damages is magnified ten-fold. Thus, it would be unfair to bind a defendant to an earlier adverse judgment when the defendant has greater incentives to allocate time, money, and resources to litigating the second action. Moreover, it would also be unfair to bind a defendant to an earlier decision when more advantageous procedural opportunities are available in a later action.[19] For example, section 28 in the Second Restatement of Judgments notes that "the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims and thus may be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim."[20]

Because the availability of offensive collateral estoppel does not encourage the conservation of judicial resources and because its application may be unfair to a defendant, the United States Supreme Court does not condone its liberal application. The Court has opined that "[t]he general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should

14. *Id.* at 330.
15. *Id.*
16. *Id.* at 326.
17. *Id.* at 330.
18. *Id.*; RESTATEMENT (SECOND) OF JUDGMENTS § 28(5) (1982).
19. *Parklane Hosiery*, 439 U.S. at 330-31.
20. RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. d (1982).

not allow the use of offensive collateral estoppel."[21]

In *United States v. Utah Construction & Mining Co.*[22] the Supreme Court extended the doctrine of collateral estoppel to decisions of administrative agencies.[23] The Court ruled that administrative agency decisions may have a binding effect if: (1) the agency acted in a judicial capacity; (2) the agency resolved clearly relevant factual disputes; (3) both parties had the opportunity to fully and fairly argue their case; and (4) both parties had an opportunity to request the court to review adverse findings.[24] A determination of whether the administrative proceeding provided both parties with a full and fair opportunity to litigate requires consideration of the following factors: the nature of the prior judicial forum, the significance of the initial claim, the incentive to litigate, the breadth of the litigation, the competence of counsel, the extent of discovery, the differences in the applicable law, and the likelihood that litigants will bring subsequent claims.[25] In addition to satisfying the *Utah Construction & Mining* test, a party seeking preclusion through an administrative determination must also establish the traditional elements of collateral estoppel. Traditional collateral estoppel is only appropriate when: (1) the identical issue was decided in the prior adjudication;[26] (2) a determination of the issue was necessary to arrive at the final judgment;[27] and (3) the party against whom the plea is being asserted was a party or in privity with a party to the prior adjudication.[28]

## III. SOUTH CAROLINA'S LIMITATIONS ON COLLATERAL ESTOPPEL

*Shelton v. Oscar Mayer Foods Corp.* is a case of first impression in this state in which the South Carolina Supreme Court confronted the issue of whether collateral estoppel should apply to decisions of the Employment Security Commission.[29] Though recognizing its previous application of collateral estoppel

---

21. *Parklane Hosiery*, 439 U.S. at 331.

22. 384 U.S. 394 (1966).

23. *Id.* at 421-23.

24. *Id.* at 422. The third element of the *Utah Construction & Mining* test is also required to satisfy traditional collateral estoppel. *See* Caras v. Family First Credit Union, 688 F. Supp. 586, 588 (D. Utah 1988).

25. Ryan v. New York Tel. Co., 467 N.E.2d 487, 491 (N.Y. 1984). *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS §§ 28, 29 (1982) (enumerating circumstances to consider in determining whether relitigation should be permitted).

26. *See* Beall v. Doe, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (1984); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

27. *See Beall*, 281 S.C. at 371, 315 S.E.2d at 191; RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

28. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

29. Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 481 S.E.2d 706 (1997).

to administrative agency decisions, the court declined to extend the doctrine to ESC decisions.[30]

These decisions are not a substitute for full and fair adjudication, and to extend their preclusive effect would require a concomitant increase in procedural protections and process. In *Shelton* the plaintiff was discharged from employment at the Louis Rich processing plant in Newberry, South Carolina, after a security guard advised management that Shelton was smoking marijuana in the company's parking lot.[31] Shelton subsequently sought to recover unemployment compensation from the ESC.[32] The ESC hearing officer concluded that "Shelton was discharged without cause and [therefore] entitled to benefits."[33] The defendant employer did not appeal the decision of the hearing officer.[34] Shelton then initiated a civil action against Louis Rich, listing breach of contract as one of his many claims.[35] Shelton argued that the defendant failed to enforce the company's rules fairly and equally, as required by the employee handbook.[36] He moved for partial summary judgment on the basis of offensive collateral estoppel, seeking to preclude Louis Rich from relitigating whether he had been discharged for smoking marijuana.[37] The judge denied this motion.[38] At trial, the judge granted the defendant's motion for a directed verdict.[39] The South Carolina Court of Appeals initially reversed the trial court's decision on the collateral estoppel issue.[40] However, in a rehearing, the court of appeals affirmed the lower court's determination, ruling that "Louis Rich should not be collaterally estopped from relitigating issues decided in a previous ESC hearing."[41] The South Carolina Supreme Court affirmed the decision of the court of appeals, similarly refusing to extend preclusive effect to the factual findings of the ESC.[42]

The supreme court reasoned that the application of collateral estoppel would run counter to the purposes of the ESC.[43] The ESC's procedures are purposely minimized so that the commission can "quickly provide benefits to persons becoming unemployed through no fault of their own."[44] The court suggested that if ESC decisions were given preclusive effect, discharged employees would be denied immediate relief because unemployment hearings would become forums for

30. *Id.* at 251-52, 481 S.E.2d at 707-08.
31. *Id.* at 250, 481 S.E.2d at 707.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Shelton*, 325 S.C. at 250, 481 S.E.2d at 707.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Shelton*, 325 S.C. at 250-51, 481 S.E.2d at 707.
42. *Id.* at 251, 481 S.E.2d at 707.
43. *Id.* at 252, 481 S.E.2d at 708.
44. *Id.* (citing S.C. CODE ANN. § 41-27-20 (Law. Co-op. 1986)).

"lengthy civil litigation."[45] Additionally, the court stated that it would be unfair to apply collateral estoppel to ESC findings.[46] First, employers often have little incentive to fully litigate the issue of an employee's discharge at unemployment compensation hearings.[47] Employer liability for unemployment compensation is small relative to damages available in a civil suit for wrongful discharge.[48] Second, the court opined that underrepresented employees could "unknowingly forfeit an opportunity to litigate significant issues in a subsequent civil action" if offensive collateral estoppel applied.[49] The court concluded its analysis by citing persuasive authority from other jurisdictions that have similarly refused to apply collateral estoppel to factual findings of unemployment proceedings.[50]

## IV. COLLATERAL ESTOPPEL IN THE EMPLOYMENT CONTEXT

Collateral estoppel is an attractive judicial device because it eliminates duplicative trial work and enables litigants to rely on the judgment of a given issue. Assertions of collateral estoppel often appear in the employment context.[51] Specifically, terminated employees that have been compensated by an unemployment commission frequently assert the doctrine in subsequent litigation seeking to take advantage of the commission's earlier factual findings.[52] This pattern is particularly true when subsequent claims are premised upon the breach of an employment contract.[53] Unemployment compensation statutes generally

---

45. *Id.*

46. *See id.* at 253, 481 S.E.2d at 708.

47. *Shelton*, 325 S.C. at 253, 481 S.E.2d at 708.

48. *Id.*

49. *Id.*

50. *Id.* at 253-54, 481 S.E.2d at 708-09 (citing Kelley v. TYK Refractories Co., 860 F.2d 1188 (3d Cir. 1988); Caras v. Family First Credit Union, 688 F. Supp. 586 (D. Utah 1988); Salida Sch. Dist. R-32-J v. Morrison, 732 P.2d 1160 (Colo. 1987); Board of Educ. v. Gray, 806 S.W.2d 400 (Ky. Ct. App. 1991); Shovelin v. Central N.M. Elec. Coop., 850 P.2d 996 (N.M. 1993); Case v. Lower Saucon Township, 654 A.2d 57 (Pa. Commw. Ct. 1995)).

51. *See, e.g.*, *Kelley*, 860 F.2d at 1189 (alleging violation of 42 U.S.C. § 1981); Salt Creek Freightways v. Wyoming Fair Employment Practices Comm'n, 598 P.2d 435, 435 (Wyo. 1979) (alleging religious discrimination).

52. *See, e.g.*, *Shelton*, 325 S.C. at 254, 481 S.E.2d at 709 (holding that an employee compensated by the ESC may not collaterally estop the employer from contesting liability in a subsequent wrongful discharge suit).

53. *Caras*, 688 F. Supp. at 587. Collateral estoppel is also asserted when subsequent proceedings include allegations of discrimination. *See, e.g.*, *Kelley*, 860 F.2d at 1189-90 (discussing an employee's allegations of discrimination in violation of 42 U.S.C. § 1981); Ross v. Communications Satellite Corp., 759 F.2d 355, 356-57 (4th Cir. 1985) (deciding whether collateral estoppel precludes the litigation of charges brought under Title VII of the Civil Rights Act of 1964); *Caras*, 688 F. Supp. 588-90 (reviewing allegations of employment discrimination, age discrimination, and sex discrimination); Colorado Springs Coach Co. v. State Civil Rights Comm'n, 536 P.2d 837 (Colo. Ct. App. 1975) (discussing charges of racial discrimination), *overruled by* Salida Sch. Dist. R-32-J v. Morrison, 732 P.2d 1160 (Colo. 1987). The Supreme Court in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), held that unreviewed administrative agency findings may not be given preclusive effect if the

provide that for a terminated employee to receive benefits, the hearing officer must determine that the employee was discharged "through no fault of his own."[54] If the employment contract provides that an employee may be discharged only for just cause, an administrative finding of "no fault" is arguably dispositive of a breach of contract issue. The employer could not have just cause for the employee's termination if the employee did not engage in misconduct. The question of whether collateral estoppel should apply to unemployment compensation decisions has been addressed in numerous jurisdictions.[55] While valid arguments support collateral estoppel in the employment context, the majority of courts, commentators, and state legislatures support the trend towards a black letter law opposing the use of collateral estoppel.[56]

### *A. Arguments Opposing Collateral Estoppel*

Those opposed to collateral estoppel focus on issues of policy and fairness in rejecting its application.[57] First, opponents argue that the application of collateral estoppel would adversely affect the unemployment compensation system.[58] As noted by the South Carolina Supreme Court, unemployment compensation hearings are purposely designed to incorporate informal, non-technical procedures so the

---

subsequent claim is based upon Title VII violations. *Id.* at 796. Thus, regardless of the nature of the unemployment compensation hearing, decisions that are not appealed to either state or federal court may not preclude subsequent litigation because "Congress has guaranteed a federal forum in Title VII cases." *Caras*, 688 F. Supp. at 589. In 1991, the United States Supreme Court extended this logic to cases brought under the Age Discrimination in Employment Act (ADEA). Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991).

54. S.C. CODE ANN. § 41-35-110(5) (Law. Co-op. 1986); *accord* GA. CODE ANN. § 34-8-194(2)(A) (1992) (providing that an individual is not qualified for benefits without "becom[ing] unemployed through no fault on the part of the individual"); *see also* ALASKA STAT. § 23.20.406(h) (Michie 1996) (providing that a claimant is ineligible to receive extended unemployment benefits if that employee was "discharged for misconduct"); FLA. STAT. ANN. § 443.111(6)(c)1.b (West 1997) (disqualifying an individual who has been "discharged from work for misconduct").

55. *See Kelley*, 860 F.2d at 1189; *Caras*, 688 F. Supp. at 588; Salida Sch. Dist. R-32-J. v. Morrison, 732 P.2d 1160 (Colo. 1987); *Gray*, 806 S.W.2d at 401; Weiler v. New Century Bank, 423 N.W.2d 664 (Mich. Ct. App.), *vacated*, 432 N.W.2d 172 (Mich. 1988); *Shovelin*, 850 P.2d at 998; Dusovic v. New Jersey Transit Bus Operations, Inc., 508 N.Y.S.2d 26 (App. Div. 1986); *Case*, 654 A.2d at 60.

56. *See* discussion *infra* Part IV.A.

57. In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), the Supreme Court held that decisions of administrative agencies may only be given preclusive effect if both parties had a full and fair opportunity to litigate. *Id.* at 422. While opponents of collateral estoppel argue that preclusion is inappropriate, their arguments are not meant to imply that judges should not consider the evidence presented at the earlier proceedings in formulating their own decisions. *See Ross*, 759 F.2d at 363.

58. *See, e.g., Shovelin*, 850 P.2d at 1004 (noting that the application of collateral estoppel would undermine legislative intent because unemployed workers may elect to forego compensation "to preserve their right to seek further civil redress," or the compensation hearings may become "full blown trials" hampering the expeditious nature of obtaining unemployment benefits).

unemployed have access to funds at early stages of unemployment.[59] Preclusion would thwart this legislative objective. Employers would have a strong incentive to contest claims for unemployment compensation because of the risk of subsequent preclusion.[60] A prevailing employer could use the administrative finding of fault offensively to prevent the employee from relitigating this determination.[61] As a result, the hearings could become lengthy trials.[62]

Moreover, if employers chose not to participate in the unemployment hearings to avoid the possibility of subsequent issue preclusion, the legislative intent behind the unemployment compensation system would be frustrated.[63] Employers may reason that because default judgments are not given preclusive effect,[64] employees that are compensated by default would not be able to subsequently estop the employer from litigating issues pertaining to the employee's termination.[65] However, compensation by default runs contrary to the objective of the unemployment compensation system. The system is designed to assist discharged employees who are *rightfully entitled* to benefits.[66] Only those employees that have been terminated through no fault of their own qualify for compensation.[67] Employees receiving compensation by default could potentially fail this statutory requirement. Similarly, employees, often lacking adequate representation at compensation proceedings, may choose to forego benefits because a loss at the compensation proceeding could preclude subsequent civil litigation.[68] By sacrificing

---

59. Shelton v. Oscar Mayer Foods, Corp., 325 S.C. 248, 253, 481 S.E.2d 706, 708 (1997).

60. *See, e.g., Morrison*, 732 P.2d at 1165 ("[T]he employer would have a strong incentive to use its superior resources consistently to oppose a discharged employee's claim for unemployment benefits.").

61. *Id.*

62. *Id.*

63. Board of Educ. v. Gray, 806 S.W.2d 400, 403 (Ky. Ct. App. 1991).

64. *See In re* Gottheiner, 703 F.2d 1136, 1140 (9th Cir. 1983); Grip-Pak, Inc. v. Illinois Tool Works, Inc. 694 F.2d 466, 469 (7th Cir. 1982); Spilman v. Harley, 656 F.2d 224, 228 (6th Cir. 1981); Massachusetts v. Hale, 618 F.2d 143, 146 (1st Cir. 1980); *In re* McMillan, 579 F.2d 289, 293 (3d Cir. 1978).

65. Willard Z. Carr, Jr., *The Preclusive Effect of Unemployment Decisions in Subsequent Litigation*, 4 LAB. LAW. 69, 72 (1988).

66. *Id.*

67. *See, e.g.*, S.C. CODE ANN. § 41-35-120(2) (Law. Co-op. 1986) (disqualifying claimants from receiving unemployment compensation upon a showing that they were "discharged for cause connected with [their] most recent work").

68. Terminated employees are not required to apply for unemployment compensation. *See* S.C. CODE ANN. § 41-35-110 (Law. Co-op. 1986) (providing that unemployed workers "shall be eligible to receive benefits" if they meet the statutory criteria, but not mandating that they exhaust their administrative remedies). Employees are free to initiate separate civil proceedings instead of seeking administrative relief. *But cf.* S.C. CODE ANN. § 8-17-330 (Law. Co-op. Supp. 1997) (requiring state employees to exhaust their administrative remedies by first bringing their complaint before the state employee grievance committee); Allen v. South Carolina Alcoholic Beverage Control Comm'n, 321 S.C. 188, 195, 467 S.E.2d 450, 454 (Ct. App. 1996) (holding that a discharged employee must exhaust administrative remedies before the State Employee Grievance Committee prior to initiating a claim for damages under the Whistleblower Act).

their right to unemployment benefits, employees would preserve their right to seek civil damages.[69] However, this also runs contrary to the legislative goal of quickly providing benefits to those *in need*.[70]

Second, opponents argue that the application of collateral estoppel to unemployment compensation decisions is inappropriate because the two tribunals do not decide identical issues.[71] Unemployment hearings determine only whether an employee satisfies the statutory requirements to qualify for compensation.[72] In South Carolina, this determination requires that the unemployed insured worker: (1) filed a claim for benefits; (2) registered for work; (3) is able and available to work; (4) has been unemployed for a waiting period of one week; and (5) "is separated, through no fault of his own, from his most recent bona fide employer."[73] While a factual finding of an employee's "fault" or "misconduct" appears relevant to allegations premised upon the breach of an employment contract, the standards of cause used in an unemployment hearing and a breach of contract case have an important difference. The District Court of South Carolina recognized this distinction and noted:

> At the hearing before the Commission, the [defendants were] required to demonstrate that the plaintiff was nonrenewed [or discharged] for reasons of "willful misconduct" in order to establish a disqualification. Defendants might very well have been unable to satisfy this standard and yet have terminated the plaintiff for valid and justifiable reasons. The "just cause" type reasons necessary for a decision to nonrenew [or discharge] may exist without the employer being able to satisfy the severe standard required by the unemployment law.[74]

---

69. Shovelin v. Central N.M. Elec. Coop., 850 P.2d 996, 1004 (N.M. 1993).

70. *Id.*; *cf.* SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION, EMPLOYER HANDBOOK ON THE SOUTH CAROLINA EMPLOYMENT SECURITY LAW 1, 1 (1995) (noting that unemployment compensation is designed to "lighten the burden of economic hardship . . . [,] stabilize purchasing power [,] and . . . [l]essen the need for public relief and charity").

71. *See* Kelley v. TYK Refractories Co., 860 F.2d 1188, 1195-96 (3d Cir. 1988); Caras v. Family First Credit Union, 688 F. Supp. 586, 589 (D. Utah 1988); Salida Sch. Dist. R-32-J v. Morrison, 732 P.2d 1160, 1166 (Colo. 1987); Board of Educ. v. Gray, 806 S.W.2d 400, 402-03 (Ky. Ct. App. 1991); Case v. Lower Saucon Township, 654 A.2d 57, 60 (Pa. Commw. Ct. 1995). *But see* Weiler v. New Century Bank, 423 N.W.2d 664, 667 (Mich. Ct. App.) (stating that collateral estoppel was appropriate for subsequent claims based upon breach of contract, fraud, and intentional infliction of emotional distress because the employment security commission duly considered these issues when it refused to grant benefits to the claimant), *vacated*, 432 N.W.2d 172 (Mich. 1988).

72. *Gray*, 806 S.W.2d at 402; *see also* S.C. CODE ANN. § 41-35-120 (Law. Co-op. 1986) (establishing the parameters for disqualification: "(1) Leaving work voluntarily . . . (2) [d]ischarge for cause connected with the employment . . . (3) [f]ailure to accept work . . . (4) [involvement in a] Labor dispute . . . (5) [r]eceiving benefits elsewhere . . . (6) [v]oluntary retirement").

73. S.C. CODE ANN. § 41-35-110 (Law. Co-op. 1986).

74. Moore v. Bonner, 526 F. Supp. 143, 150 (D.S.C. 1981), *rev'd on other grounds*, 695 F.2d 799 (4th Cir. 1982).

Also, in *Teamsters Local Union No. 273 v. CSX Beckett Aviation, Inc.*[75] the Western District of Pennsylvania held that a finding of the state unemployment compensation board could not operate to estop the employer from relitigating the issue of whether the employee was terminated for "just cause" as required by the collective bargaining agreement.[76] The court noted that an unemployment proceeding should not be given preclusive effect because an employee awarded benefits due to a lack of "willful misconduct" may still have been discharged for "just cause."[77] In other words, "'[a]n employee may be terminated for cause that does not rise to the level of misconduct disqualifying him from unemployment benefits.'"[78] Thus, it would be unfair to bind the employer to an adverse decision on the issue of employee misconduct when the employer would be able to establish that the employee was discharged for just cause. The Second Restatement of Judgments accepts this argument and asserts that collateral estoppel is inappropriate when the party sought to be precluded has "a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action."[79]

Also, other issues pertinent to the employee's subsequent claim may not have been litigated at the unemployment proceeding. For example, in determining whether employees were discharged through their own fault, hearing officers rarely consider whether an employee's race, ethnicity, national origin, religion, gender, or age played a role in the discharge.[80] Primarily, substantial differences between unemployment compensation and civil rights statutes separate these specific facts. Unemployment compensation statutes focus on the forbidden conduct of the employee, whereas civil rights statutes target the forbidden motive of the employer.[81]

Third, opponents argue that collateral estoppel is inappropriate in the employment context[82] because "the burden [of persuasion] has shifted to [the] adversary."[83] At unemployment hearings, the employer bears the burden of proving that the employee was discharged due to misconduct or fault.[84] Yet, if the employee brings a subsequent civil action against the employer, the burden of proof shifts

---

75. 687 F. Supp. 985 (W.D. Pa. 1988).

76. *Id.* at 987.

77. *Id.*

78. Bernstein v. Birch Wathen Sch., 421 N.Y.S.2d 574, 576 (App. Div. 1979) (quoting Silberman v. Penn Gen. Agencies of N.Y., Inc., 406 N.Y.S.2d 93, 94 (App. Div. 1978)); *see also* James v. Levine, 315 N.E.2d 471, 475 (N.Y. 1974) ("Causes for discharge which do not attain the level of misconduct may not be used to render claimants ineligible for benefits.").

79. RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982).

80. *See* Kelley v. TYK Refractories Co., 860 F.2d 1188, 1195 (3d Cir. 1988) (concluding that Pennsylvania's unemployment compensation law and 42 U.S.C. § 1981 promote different public policies and so issue preclusion was inappropriate).

81. Ross v. Communications Satellite Corp., 759 F.2d 355, 362 (4th Cir. 1985).

82. *See* Carr, *supra* note 65, at 76.

83. RESTATEMENT (SECOND) OF JUDGMENTS § 28(4) (1982).

84. *See* Carr, *supra* note 65, at 76.

from the employer to the employee.[85] Opponents argue that it is unfair to prohibit an employer from contesting liability in a subsequent civil suit when the burden of proof has shifted.[86] In particular, this is evident when the employee brings a subsequent claim alleging breach of contract. Clearly, the application of collateral estoppel would be unfair to an employer who barely fails to prove the employee's misconduct at the unemployment hearing, but whose evidence would have established a prima facie case of just cause for the termination.[87] Collateral estoppel would enable employees to establish the absence of just cause in contract claims even though their own evidence would fail to prove this essential element.

Fourth, opponents of collateral estoppel in the employment context argue that employers often have little incentive to participate fully in the unemployment compensation hearings.[88] Frequently, the amount in controversy in a civil action greatly exceeds liability for unemployment compensation.[89] The Second Restatement of Judgments provides that collateral estoppel "would be plainly unfair" when the amount in controversy in the first action is small relative to that recoverable in the second proceeding.[90]

Finally, opponents have noted the procedural differences between unemployment hearings and civil trials.[91] Civil trials typically have formal rules of evidence, full discovery, adequate time for witnesses to testify, a judge with a law degree, and the right to a trial by jury.[92] In contrast, unemployment proceedings often have relaxed rules of evidence, limited discovery, and minimal opportunities for trial preparation.[93] Opponents of collateral estoppel argue that it would be unfair to multiply the consequences of a judgment when the record has not been fully developed.[94]

These arguments against the application of collateral estoppel to decisions made

---

85. *Id.*

86. *See id.*

87. *See id.*

88. *See id.* at 74-75; Board of Educ. v. Gray, 806 S.W.2d 400, 403 (Ky. Ct. App. 1991).

89. *See, e.g.*, Hicks v. Quaker Oats Co., 662 F.2d 1158, 1171 (5th Cir. 1981) (noting the unfairness of binding the defendant to the unemployment compensation board's decision when the amount at stake in the board hearing was $35,000, but the plaintiffs stood to collect over $400,000 on the current judgment). If an employee is found eligible for compensation in South Carolina, there is no immediate monetary effect on the employer. Rather, the employer's contribution rating is minimally increased the following year. *See* S.C. CODE ANN. §§ 41-31-20 to -50 (Law. Co-op. 1986 & Supp. 1997).

90. RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. j (1982).

91. *See* Caras v. Family First Credit Union, 688 F. Supp. 586, 589-90 (D. Utah 1988); *Gray*, 806 S.W.2d at 403; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 28(3) (1982) ("A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts.").

92. *See, e.g.*, S.C. R. CIV. P. 26 (discovery); S.C. R. CIV. P. 38 (jury trial); S.C. R. EVID.

93. *Caras*, 688 F. Supp. at 589-90; *Gray*, 806 S.W.2d at 403.

94. *See, e.g.*, *Caras*, 688 F. Supp. at 589-90 (noting that the doctrine of collateral estoppel should not apply because in the preparation for the administrative hearing the parties did not conduct discovery on the plaintiff's discrimination and breach of contract claims).

at unemployment compensation proceedings and the almost uniform judicial rejection of the doctrine in this area have prompted several state legislatures to enact statutes specifically proscribing its application in this context.[95] These laws generally provide that findings of fact or law made with respect to unemployment compensation proceedings are neither conclusive nor binding in subsequent proceedings, even if the same parties and the same facts are involved.[96]

### *B. Arguments Favoring Collateral Estoppel*

Not all courts and commentators agree that the application of collateral estoppel is inappropriate in the employment context.[97] Some courts have found that unemployment proceedings should be given preclusive effect because both tribunals examine identical issues. For example, in *Salt Creek Freightways v. Wyoming Fair Employment Practices Commission*[98] the Wyoming Supreme Court held that an employee who was denied benefits at an unemployment compensation hearing should be barred from relitigating the issue of alleged religious discrimination before the Fair Employment Practices Commission.[99] The court reasoned that both agencies would be asked to determine the same issue (i.e., the reason behind the employee's termination) based upon the same set of facts.[100] In *Ryan v. New York Telephone Co.*[101] the New York Court of Appeals reasoned that identical issues would be addressed by both the unemployment compensation tribunal and the civil court.[102] The administrative law judge in that case specifically found that the discharged employee did not qualify for unemployment benefits because the employee "was guilty of unauthorized removal and possession of company property, and that he was discharged for that reason."[103] The court concluded that this finding was dispositive of the employee's subsequent allegations of false arrest,

---

95. ALASKA STAT. § 23.20.497 (Michie 1996); ARK. CODE ANN. § 11-10-314(f)(2) (Michie 1996); CAL. UNEMP. INS. CODE § 1960 (West Supp. 1997); COLO. REV. STAT. § 8-74-108 (1997); CONN. GEN. STAT. ANN. § 31-249g(b) (West Supp. 1997); IDAHO CODE § 72-1368(k)(2) (Supp. 1997); KY. REV. STAT. ANN. § 341.420(5) (Michie 1995); LA. REV. STAT. ANN. § 23:1636 (West Supp. 1997); ME. REV. STAT. ANN. tit. 26, § 1194(12) (West Supp. 1996); N.H. REV. STAT. ANN. § 282-A:180 (Supp. 1996); N.M. STAT. ANN. § 51-1-55 (Michie Supp. 1993); OHIO REV. CODE ANN. § 4141.28(S) (Anderson 1995); TENN. CODE ANN. § 50-7-304(k) (Supp. 1997).

96. Statutes denying preclusive effect to factual findings of unemployment compensation boards operate to diminish the precedential value of judicial opinions. *See* Salida Sch. Dist. R-32-J v. Morrison, 732 P.2d 1160, 1164 n.4 (Colo. 1987). *But cf.* Cortright v. Premix, Inc., No. 90-A-1531, 1991 WL 132189, at *2-3 (Ohio Ct. App. July 19, 1991) (unpublished opinion) (refusing to assign error to the trial court's application of collateral estoppel in spite of a statutory provision that prohibits its extension to decisions of the unemployment compensation board).

97. *See* Carr, *supra* note 65, at 79-81.

98. 598 P.2d 435 (Wyo. 1979).

99. *Id.* at 440.

100. *Id.* at 438-39.

101. 467 N.E.2d 487 (N.Y. 1984).

102. *Id.* at 490-91.

103. *Id.* at 491.

malicious prosecution, and wrongful discharge.[104] Specifically, the court determined that the lack of a legal justification, an essential element of false arrest, was refuted by the finding that the employee engaged in criminally chargeable misconduct.[105] Also, the administrative ruling that the criminal charges were justified established probable cause for the employer to institute criminal proceedings and thus disposed of the employee's claim for malicious prosecution.[106] Furthermore, the court held that the issue of wrongful discharge was previously decided because the administrative judge found that the employee's conduct justified the discharge.[107] In *Weiler v. New Century Bank*[108] the Michigan Court of Appeals held that collateral estoppel should be applied to decisions of the Michigan Employment Security Commission because a finding that the plaintiff left her job voluntarily was dispositive on the issue of wrongful discharge.[109] However, this decision must be limited to its facts.

In addition to maintaining that both the administrative and civil tribunals examine identical issues, proponents of collateral estoppel argue that unemployment hearings provide litigants with a full and fair opportunity to present their claims.[110] Although unemployment proceedings are often informal, litigants are afforded the opportunity to be represented by counsel, to give testimony, to present witnesses, and to have access to limited discovery.[111] Furthermore, both parties have a statutory right to appeal these decisions.[112] The right to appeal provides litigants with additional time and ensures that issues are fully and fairly litigated.

Furthermore, absent any preclusive effect, a court reviewing both decisions may be obliged to affirm inconsistent results.[113] For example, a reviewing court could affirm a decision of the employment security commission finding an employee ineligible for benefits because of misconduct and also affirm a decision of the state employee grievance committee holding that the state employee's alleged misconduct was merely a pretext for the employer's discriminatory motive. Therefore, although the reviewing court would agree that the employee engaged in misconduct, the court's decision would entitle the employee to recover for wrongful discharge. This inconsistency, one of the anomalies that collateral estoppel is

104. *Id.* at 491-92.
105. *Id.*
106. *Id.* at 492.
107. *Ryan*, 467 N.E.2d at 492.
108. 423 N.W.2d 664 (Ct. App.), *vacated*, 432 N.W.2d 172 (Mich. 1988).
109. *Id.* at 667-68.
110. *See* Carr, *supra* note 65, at 80.
111. *See, e.g., Ryan*, 467 N.E.2d at 492 (finding that "[the plaintiff] did, in fact, litigate the issue, testifying himself and cross-examining defendants' witness through his union representative").
112. *See, e.g.*, S.C. CODE ANN. §§ 41-35-660 to -750 (Law. Co-op. 1986) (providing appellate procedures). In South Carolina, an employee's claim for benefits is first determined by the state examiner. The employee or employer may appeal this determination to the ESC and then to the courts of South Carolina. *Id.*
113. Umberfield v. School Dist. No. 11, 522 P.2d 730, 734 (Colo. 1974).

designed to eliminate,[114] may cause litigants to lose faith in the judicial system.

Proponents of collateral estoppel criticize the argument that litigants have little incentive to litigate in the first proceeding because the argument is based on circular logic.[115] If both parties know that the unemployment proceeding will have a preclusive effect in subsequent litigation, both clearly will have an incentive to fully litigate.[116] Furthermore, the burden of proof might not shift in the subsequent proceeding.[117] An employer who bears the burden of proving misconduct at the unemployment proceeding would continue to bear this burden if the employer initiated the subsequent civil proceeding.[118] For example, if after the employee's termination and compensation hearing, the employer brought an action against the discharged employee for the conversion of company property, the burden of proof would not switch from the employer to the employee. Finally, some courts hold that a litigant who does not appeal administrative decisions should be barred from subsequently relitigating the factual findings in civil court.[119] These courts justify preclusion by applying a general rule that unappealed orders are binding on all parties without regard to the prior forum.[120]

## V. *SHELTON V. OSCAR MAYER FOODS CORP.*: WHERE DO WE GO FROM HERE?

As evidenced by the holding in *Shelton*, the South Carolina Supreme Court found the arguments opposing the application of collateral estoppel persuasive.[121] But what effect will the *Shelton* decision have on subsequent litigation in South Carolina? Should the holding be limited exclusively to assertions of offensive collateral estoppel (at issue in the *Shelton* case), or should it similarly apply to defensive collateral estoppel? In other words, should the courts of South Carolina also refuse to apply collateral estoppel if an employer asserts it defensively after the ESC denied the employee's claim for compensation? If the holding in *Shelton* is interpreted as rejecting both forms of collateral estoppel, should the South Carolina General Assembly take the next step and statutorily abrogate the doctrine completely in the employment context?

A literal reading of the court's opinion suggests that the court completely

---

114. *See* Beall v. Doe, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984).

115. *See* Carr, *supra* note 65, at 80.

116. *Id.* However, this argument appears to run contrary to the legislative objective of providing prompt relief to employees discharged through no fault of their own.

117. *Id.*

118. *Id.*

119. Stall v. Bourne, 774 F.2d 657, 663 (4th Cir. 1985) (construing South Carolina law as allowing collateral estoppel to operate when an earlier decision is not appealed); *see also* Salt Creek Freightways v. Wyoming Fair Employment Practices Comm'n, 598 P.2d 435, 440 (Wyo. 1979) ("[T]he decision of the E.S.C. became conclusive when [the former employee] failed to appeal.").

120. *See Stall*, 774 F.2d at 663-64.

121. *See* Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 252-54, 481 S.E.2d 706, 708-09 (1997).

rejected both offensive and defensive collateral estoppel as it pertains to ESC decisions.[122] Evidence that the court rejected both offensive and defensive collateral estoppel is found in the following language: "[E]mployees are often unrepresented in ESC hearings. If collateral estoppel applied, an unwary employee could unknowingly forfeit an opportunity to litigate significant issues in a subsequent civil action."[123] Collateral estoppel only operates to preclude parties from relitigating decided issues when they had a full and fair opportunity to litigate and *lost* in the prior proceeding.[124] Therefore, employees "unknowingly forfeit[ing] an opportunity to litigate"[125] must have been denied compensation at the ESC hearing in order for collateral estoppel to operate against them. As such, the court's statement has two reasonable interpretations. One reading implies that an employer should not be able to take advantage of *offensive* collateral estoppel in a subsequent suit against the employee when the employee was previously denied compensation benefits. For example, a finding that the employee was at fault should not offensively preclude the employee from defending an action subsequently brought by the employer. The other reading of this statement implies that collateral estoppel should not be applied *defensively*. An employer should not be able to assert defensive collateral estoppel to preclude an employee from bringing subsequent civil claims against the employer when it was previously determined that the employee was at fault and ineligible for benefits.

If, indeed, the court intended to completely abrogate the application of collateral estoppel in the unemployment compensation context, it did so rejecting the logic that was applied in prior decisions involving different administrative agencies.[126] The South Carolina General Assembly may now consider enacting a statute that specifically proscribes the application of collateral estoppel in employment proceedings.[127] A statute to this effect would provide greater

---

122. *Id.* at 254, 481 S.E.2d at 709 ("[F]indings of fact made during an ESC hearing will not be given preclusive effect in any subsequent litigation between the employer and employee.").

123. *Id.* at 253, 481 S.E.2d at 708.

124. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979).

125. *Shelton*, 325 S.C. at 253, 481 S.E.2d at 708.

126. Perry v. State Law Enforcement Div., 310 S.C. 558, 426 S.E.2d 334 (Ct. App. 1992). In *Perry* the court held that the State Law Enforcement Division's decision to uphold an employee's discharge should be given preclusive effect in a subsequent breach of contract action. *Id.* at 561, 426 S.E.2d at 336. The court reasoned that "[t]he two actions arise out of the same facts, and they seek adjudication that [the employee's] discharge was unwarranted." *Id.* Furthermore, "the same rights and defenses [would be] available" to the aggrieved employee in both actions. *Id.*; *see also* Stall v. Bourne, 774 F.2d 657 (4th Cir. 1985) (construing South Carolina law as requiring the application of collateral estoppel when the ESC denied benefits and the employee subsequently initiated a suit alleging constitutional violations); Bennett v. South Carolina Dep't of Corrections, 305 S.C. 310, 408 S.E.2d 230 (1991) (holding that an employee was precluded from asserting claims of retaliatory discharge when the employee fully litigated the issue before the State Employee Grievance Committee); Liberty Mutual Ins. Co. v. Employers Ins. of Wausau, 284 S.C. 234, 325 S.E.2d 566 (Ct. App. 1985) (barring the relitigation of an alleged sham defense when a prior worker's compensation proceeding established that the defense was valid).

127. For example, in 1991, the Court of Appeals of Kentucky held that collateral estoppel may

consistency in the application of collateral estoppel.[128]

While in certain circumstances the state unemployment board does not resolve the same issues that are involved in a subsequent proceeding and the expedient nature of the proceeding may deny litigants a full and fair opportunity to litigate, this is not necessarily true for *all* unemployment proceedings and for *all* issues. General legislative or judicial prohibitions against the application of both offensive and defensive collateral estoppel are unreasonably excessive. Rather than universally abrogating collateral estoppel in the unemployment compensation context, a more appropriate approach may be either to continue addressing the issue on a case-by-case basis, giving due regard to whether estoppel is being asserted defensively or offensively, or to legislatively abrogate only the application of offensive collateral estoppel.

Although United States Supreme Court decisions are not binding on the states in this context,[129] the Court's logic merits consideration. In *United States v. Utah Construction & Mining Co.*[130] the Court held that an extension of collateral estoppel to administrative agency decisions is appropriate if the judicial agency properly resolved issues of fact and provided the parties with "an adequate opportunity to litigate."[131] As such, preclusion would conserve judicial resources because "[t]here is . . . neither need nor justification for a second evidentiary hearing."[132] Subsequently, the Supreme Court decided *Parklane Hosiery Co. v. Shore*.[133] In *Parklane Hosiery* the Court distinguished between offensive collateral estoppel and defensive collateral estoppel.[134] In discussing the differences between the two forms of preclusion, the Court stated that "the two situations should be treated

---

not be used in a subsequent civil trial to preclude the relitigation of factual findings entered at an unemployment compensation hearing. Board of Educ. v. Gray, 806 S.W.2d 400 (Ky. Ct. App. 1991). In 1992, the Kentucky legislature codified this holding. *See* KY. REV. STAT. ANN. § 341.420(5) (Michie 1995).

Statutes in abrogation of collateral estoppel seem to represent legislative recognition of the inherent unfairness of unemployment compensation hearings. Would it be more appropriate for legislatures to statutorily correct this unfairness rather than deprive litigants of the judicially created doctrine?

128. *See* Noyes v. Channel Products, Inc., 935 F.2d 806, 809 n.1 (6th Cir. 1991) (noting that but for the prohibition against retroactive application of legislative initiatives, the Ohio statute uniformly abrogating the application of collateral estoppel would resolve the dispute). *But see* Cortright v. Premix, Inc., No. 90-A-1531, 1991 WL 132189, at *3 (Ohio Ct. App. July 19, 1991) (unpublished opinion) (stating that the trial court's application of collateral estoppel did not constitute reversible error in spite of the Ohio statute prohibiting its use).

129. *See* Beall v. Doe, 281 S.C. 363, 369-70, 315 S.E.2d 186, 190 (Ct. App. 1984) (noting that although the United States Supreme Court has approved of nonmutual offensive collateral estoppel, state courts are split on whether the doctrine should be applied).

130. 384 U.S. 394 (1966).

131. *Id.* at 422.

132. *Id.*

133. 439 U.S. 322 (1979).

134. *Id.* at 329-31.

differently."[135] Presumably, offensive collateral estoppel drains judicial resources and implicates issues of unfairness.[136]

State courts have also distinguished between offensive and defensive collateral estoppel. In *Bernstein v. Birch Wathen School*[137] a New York appellate court properly distinguished the various applications of the doctrine and indicated that cases involving offensive collateral estoppel should not control cases involving defensive collateral estoppel.[138] Specifically, the court suggested that a different rule applies when an employee is granted unemployment benefits, as opposed to when the employee is found ineligible.[139] If the unemployment board compensates the claimant, the employee should not be able to collaterally estop the employer from litigating the issue of termination in a subsequent wrongful discharge suit. The court noted that "other valid reasons may have justified [the employee's] discharge."[140] However, if the claimant is found ineligible for benefits, either due to "voluntary termination without good cause" or due to "misconduct," this finding is dispositive of wrongful discharge allegations.[141] Relitigating the issue of an employee's wrongful discharge wastes judicial resources because another tribunal has already determined that the employee either the job quit or engaged in misconduct. In *Bernstein* the court ultimately held that collateral estoppel was appropriately applied.[142]

In *Dusovic v. New Jersey Transit Bus Operations, Inc.*[143] another New York appellate court also recognized the distinction between the two forms of estoppel.[144] The court held that a compensated employee may not apply collateral estoppel offensively to preclude the defendant employer from challenging liability in the employee's subsequent breach of contract claim.[145] In doing so, the court distinguished *Ryan v. New York Telephone Co.*[146] In *Ryan*, a case involving the application of defensive collateral estoppel,[147] the defendant telephone company asserted collateral estoppel as an affirmative defense to the plaintiff's subsequent

---

135. *Id.* at 329. In a footnote, the Court listed numerous commentators who "have expressed reservations" pertaining to offensive collateral estoppel. *Id.* at 329 n.11; *see* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281 (1957); Herbert Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968).

136. *See Parklane Hosiery*, 439 U.S. at 329-30.

137. 421 N.Y.S.2d 574 (App. Div. 1979).

138. *Id.* at 576-77.

139. *See id.* (distinguishing cases that hold collateral estoppel inapplicable because the discharged employee was awarded unemployment compensation).

140. *Id.* at 576.

141. *See id.* at 576-77.

142. *Id.* at 578.

143. 508 N.Y.S.2d 26 (App. Div. 1986).

144. *See id.* at 28.

145. *Id.*

146. 467 N.E.2d 487 (N.Y. 1984).

147. *Id.* at 489.

breach of contract claim.[148] In an earlier proceeding before an administrative law judge, the plaintiff was denied unemployment benefits because "[the employee] lost his employment due to misconduct."[149] Reversing the lower court, the New York Court of Appeals found that the requisite criteria for collateral estoppel had been satisfied and that the doctrine should be applied.[150] The *Dusovic* court, in distinguishing *Ryan*, suggested that fairness issues were not implicated in *Ryan* because the plaintiff "had initiated the prior administrative proceeding and had a clear incentive and did litigate thoroughly the issue of his discharge."[151]

*Bernstein*, *Dusovic*, and *Ryan* demonstrate that the arguments against collateral estoppel are clearly not as persuasive when the doctrine is asserted defensively. If an employer is able to satisfy its heightened burden of proving employee "misconduct" and a claimant is denied benefits, the employer should be able to assert collateral estoppel defensively in a subsequent proceeding that resolves the same issues. Unlike the application of offensive collateral estoppel, the defensive use of the doctrine does not implicate the same matters of fairness. Claimants that initiate unemployment hearings generally have an incentive to litigate because it is their right to compensation that is at stake. Employers, on the other hand, may not have a comparable incentive to fully litigate because the amount in controversy is often negligible. If an employment compensation board finds that an employer, who has used minimal resources, has satisfied the heightened burden of proving either employee misconduct or voluntary termination, judicial resources would be wasted if the employee were to relitigate the same issue in a subsequent proceeding when the burden of proof has shifted to the employee. Furthermore, the application of defensive collateral estoppel is fair because claimants found ineligible for benefits generally have a statutory right to appeal to a higher tribunal.[152] Because this statutory right normally includes judicial review,[153] claimants are protected from possible procedural unfairness.

## VI. CONCLUSION

The language of the *Shelton* decision seems very clear. Collateral estoppel should not be applied to prevent the relitigation of issues already decided by the ESC.[154] However, such a broad prohibition is unnecessarily excessive because it restricts the application of both offensive and defensive collateral estoppel. Although the two doctrines are conceptually related, they have different

148. *Id.*
149. *Id.*
150. *Id.* at 493.
151. *Dusovic*, 508 N.Y.S.2d at 28.
152. *See, e.g.*, S.C. CODE ANN. § 41-35-740 (Law. Co-op. 1982) (providing that judicial review is available to aggrieved parties after they have exhausted their administrative remedies).
153. *Id.*
154. Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 254, 481 S.E.2d 706, 709 (1997).

applications and consequences. The underlying rationales used by the supreme court in *Shelton* apply more readily to offensive, rather than defensive, collateral estoppel. As a result, *Shelton* should only preclude the offensive use of ESC decisions in subsequent civil litigation.

*Suzanne M. Guitar*

# EMPLOYER IMMUNITY FOR EMPLOYMENT REFERENCES: MAYBE, MAYBE NOT

## I. INTRODUCTION

In May of 1996 South Carolina joined a national trend[1] by enacting a statute that purports to grant employers immunity for disclosing certain truthful information concerning current or former employees to prospective employers.[2] Unfortunately,

---

1. Julie Forster, *25 States Adopt 'Good Faith' Job Reference Laws to Shield Businesses from Liability*, WEST'S LEGAL NEWS 6402, July 2, 1996, *available in* 1996 WL 363324. Since the publication of the Forster article, a number of other states have enacted similar legislation. *See, e.g.*, N.C. GEN. STAT. § 1-539.12 (Supp. 1997) (providing immunity for civil liability for employers that disclose information); N.D. CENT. CODE § 34-02-18 (Supp. 1997) (providing employers with immunity for employment references).

2. The employer immunity statute reads:

> (A) As used in this section:
>
> (1) "Employer" means any person, partnership, for profit or nonprofit corporation, limited liability corporation, the State and its political subdivisions and their agents that employ one or more employees. As used in this definition, "agent" means any former supervisor or the employer's designee.
>
> (2) "Employee" means any person employed by an employer.
>
> (3) "Evaluation" means a written employee evaluation which was conducted by the employer and signed by the employee, including any written employee response to the evaluation, before the employee's separation from the employer and of which the employee, upon written request, shall be given a copy.
>
> (4) "Former employee" means an individual who was previously employed by an employer.
>
> (5) "Job performance" includes, but is not limited to, attendance, attitude, awards, demotions, duties, effort, evaluations, knowledge, skills, promotions, and disciplinary actions.
>
> (6) "Prospective employer" means any employer to which a prospective employee has made application, either oral or written, or forwarded a resume or other correspondence expressing an interest in employment.
>
> (7) "Prospective employee" means any person who has made an application either oral or written or has sent a resume or other correspondence to a prospective employer indicating an interest in employment.
>
> (B) Unless otherwise provided by law, an employer shall be immune from civil liability for the disclosure of an employee's or former employee's dates of employment, pay level, and wage history to a prospective employer.
>
> (C) Unless otherwise provided by law, an employer who responds in writing to a written request concerning a current employee or former employee from a prospective employer of that employee shall be immune from civil liability for disclosure of the following information to which an employee or former employee may have access:
>
> (1) written employee evaluations;
>
> (2) official personnel notices that formally record the reasons for separation;
>
> (3) whether the employee was voluntarily or involuntarily released from

the statute provides employers little real protection. The statute's alleged "safe harbor" only allows employers to disclose, both orally and in writing, employment dates, pay level, and wage history.[3] To disclose additional information, employers must respond in writing to a prospective employer's written request for information.[4] However, according to common-law defamation principles, employers were free to divulge this information prior to the statute's enactment.[5] Thus, the statute pays little more than lip service to "employer immunity." Indeed, if a court finds that the South Carolina General Assembly intended that the statute supplant common-law defamation principles, the statute may even abrogate employer rights by limiting the content of protected references.

This Note examines the reasons for the statute's adoption and its terms for providing immunity. After an overview of South Carolina defamation law, this Note explores the interaction between the employer immunity statute and common-law defamation principles. This Note concludes with recommendations to the General Assembly for improving the effectiveness of the statute.

## II. BACKGROUND

Employers across the nation have increasingly adopted "no comment" policies in response to requests for employment references.[6] Their failure to provide employment references is largely due to a fear that employees receiving negative references will subsequently sue for defamation.[7] Historically, employees have also brought suit under theories of intentional interference with contract,[8] intentional misrepresentation,[9] or retaliation under Title VII.[10] Some states have even allowed

---

service and the reason for the separation; and

(4) information about job performance.

(D) This protection and immunity shall not apply where an employer knowingly or recklessly releases or discloses false information.

S.C. CODE ANN. § 41-1-65 (Law. Co-op. Supp. 1997).

3. *Id.* § 41-1-65(B). Pure factual information, such as employment dates, pay level, and wage history, is probably incapable of imparting defamatory meaning.

4. *Id.* § 41-1-65(C).

5. *See generally* Thomas R. Haggard & William H. Floyd, III, *Workplace Defamation*, S.C. LAW., Sept./Oct. 1991, at 10, 11-13 (explaining that an employer can be liable for defamation only after a plaintiff establishes that the communication was defamatory and caused the plaintiff's damage).

6. *See* Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 46-49 (1995); *see also* Forster, *supra* note 1 (citing Michael Fields, South Carolina's state director for the National Federation of Independent Businesses (NFIB), who stated that employers were receiving inadequate employment information when seeking employment references and that passing employer immunity legislation was identified as a priority across the country for the NFIB).

7. Forster, *supra* note 1.

8. *See* Prescott v. Farmers Tel. Coop., 328 S.C. 379, 394-95, 491 S.E.2d 698, 706 (Ct. App. 1997).

9. *See* McNierney v. McGraw-Hill, Inc., 919 F. Supp. 853 (D. Md. 1995).

10. *See* Causey v. Balog, 929 F. Supp. 900 (D. Md. 1996).

employees to sue for defamation under the doctrine of self-publication[11] or the tort of negligent hiring.[12] However, defamation is currently the most prevalent and successful cause of action for plaintiffs that are dissatisfied with their employment references.[13] According to a 1988 survey, one-third of all defamation cases were brought by employees that allegedly received defamatory job references.[14] Because of the importance of defamation law in the context of employment references, this Note will focus specifically on the interplay between South Carolina's employer immunity statute and common-law defamation.

According to a recent employment survey, employer reference checking is more important than ever.[15] In a national survey, forty-four percent of respondents said that a company's refusal to comment on an employee's performance adversely affected the employee's opportunity to gain employment.[16] Nevertheless, despite the importance placed on employment references, many employers have adopted strict "no comment" policies.[17] Thus, while employment references have risen in importance, the number of employers willing to provide these references has decreased.[18] In response to employer concerns, the Society for Human Resource

---

11. *See, e.g.*, Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986) ("The trend of modern authority persuades us that Minnesota law should recognize the doctrine of compelled self-publication."). Under the doctrine of compelled self-publication, an employer can be held liable when the employer knows that a defamed employee will be compelled to repeat a defamatory statement to a prospective employer. *Id.* at 886. *But see* Carson v. Southern Ry. Co., 494 F. Supp. 1104, 1113-14 (D.S.C. 1979) (finding no publication when the employee repeated an allegedly defamatory statement to co-workers even though the employer could have reasonably foreseen that the statement would be repeated by the employee).

12. *See* Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1418 (1996). Negligent hiring occurs when an employer hires an employee with dangerous tendencies that "the employer could have discovered upon reasonable investigation, but did not." *Id.* Although negligent hiring is not recognized in South Carolina, this tort continues to grow in popularity and should genuinely concern employers.

13. Note, *References Available Upon Request... Not!—Employers Are Being Sued for Providing Employee Job References*, 17 AM. J. TRIAL ADVOC. 755, 756 (1994).

14. James W. Fenton, Jr. & Kay W. Lawrimore, *Employment Reference Checking, Firm Size, and Defamation Liability*, 30 J. SMALL BUS. MGMT. 88, 88 (1992).

15. Adler & Peirce, *supra* note 12, at 1387.

16. Saxton, *supra* note 6, at 50. The survey posed the following question and received the following answers: "Is a company's refusal to comment on an employee's performance a detriment to his or her chances of getting a job? Responses: No 51%; Yes 44%; Don't Know 5%." *Id.* at 50 n.18.

17. *See* Adler & Peirce, *supra* note 12, at 1386; *see also* Alex B. Long, Note, *Addressing the Cloud Over Employee References: A Survey of Recently Enacted State Legislation*, 39 WM. & MARY L. REV. 177 (1997) (proposing a model statute that would require employers to reveal information about employees under certain circumstances). The author notes that "[b]y disclosing negative information, employers potentially expose themselves to defamation claims. By intentionally failing to include negative information, employers face possible negligent referral claims. These rulings have helped to create a 'damned if you do, damned if you don't' fear among employers that discourages the exchange of references." *Id.* at 188 (footnotes omitted).

18. Adler & Peirce, *supra* note 12, at 1386-87.

Management began a national campaign encouraging states to adopt some form of employment immunity statute for employers that provide "good faith" job references.[19] Prior to 1995, only five states had enacted some form of employer immunity statute.[20] Now, over half of the states, including South Carolina, have enacted employer immunity statutes.[21]

## III. THE SOUTH CAROLINA STATUTE

The South Carolina employer immunity statute appears to have been enacted to eliminate some of the risks employers face when providing employment references.[22] The statute is based on the premise that information is an important aspect of the employment decision. Because a "no comment" policy restricts the flow of information and limits an employer's ability to make a responsible hiring decision, the employer immunity statute attempts to provide a safe harbor for employers disclosing information concerning current or former employees.

In subsection (B)[23] the statute provides employers[24] civil immunity for disclosing the following information about a current or former employee: (1) dates of employment, (2) pay level, and (3) wage history.[25] This limited immunity[26] extends to written or oral communications.[27] The safe harbor provided by subsection (C) encompasses a broader range of information than does subsection (B).[28] Also, the immunity in subsection (C) is limited to written responses for written requests.[29] Employers that comply with the statutory terms are immune from civil liability, unless otherwise provided by law.[30] Under subsection (C), employers can disclose information that includes the following: "(1) written employee evaluations; (2) official personnel notices that formally record the reasons for separation; (3) whether the employee was voluntarily or involuntarily released from service and the reason for the separation; and (4) information about job performance."[31] The safe

---

19. Forster, *supra* note 1.

20. *Id.* These states were Alaska, California, Colorado, Florida, and Georgia. *Id.*

21. *Id.*

22. The caption to the Senate version of the employer immunity statute purported that the statute was "to grant employers immunity, both absolute and qualified depending on the scope of the information, for responding to prospective employers' requests for references." S. 1041, 111th Gen. Assembly, 2d Sess. (S.C. 1996).

23. S.C. CODE ANN. § 41-1-65(B) (Law. Co-op. Supp. 1997).

24. The statute defines "employers." *Id.* § 41-1-65(A)(1).

25. *Id.* § 41-1-65(B).

26. According to subsection (D), the statute does not provide immunity to an employer who "knowingly or recklessly releases or discloses false information." *Id.* § 41-1-65(D).

27. Subsection (C), however, provides immunity only for certain *written* requests and *written* responses. *Id.* § 41-1-65(C).

28. *Id.*

29. S.C. CODE ANN. § 41-1-65(C) (Law. Co-op. Supp. 1997).

30. *Id.*

31. *Id.*

harbor provisions of subsection (C) apply only to "information to which an employee or former employee may have access."[32] As a result, the safe harbor will usually only apply to documented information and not to oral communications. Although an employee may theoretically have "access" to oral information regarding job performance, the receipt of this information may be difficult to prove unless the employer relayed this information to the employee in someone else's presence. Moreover, if the information communicated to the employee is negative, the presence of another party may itself provide grounds for a defamation suit.

Both subsections (B) and (C) are prefaced by the phrase "[u]nless otherwise provided by law."[33] The intent of the General Assembly is not entirely clear. Does the phrase encompass federal law? Other statutory law? South Carolina common law? The language implies that mere compliance with the statute's terms does not necessarily insulate an employer from liability. The language especially raises a problem with regard to South Carolina common law. For example, according to the statute, an employer cannot take advantage of the safe harbor when the employer "knowingly or recklessly releases or discloses false information."[34] Thus, an employer who acts knowingly or recklessly may be subject to liability for disclosing false information, regardless of compliance with the requirements set out in subsections (B) and (C). According to *Rogers v. Florence Printing Co.*,[35]

> The test by which a tort is to be characterized as reckless, willful or wanton is whether it has been committed in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights.[36]

This broad common-law definition may encompass situations in which a defendant's communication exceeded its scope,[37] or when a defendant acted with actual malice.[38] Thus, at common law, an employer may be held liable for maliciously revealing information that the employer believes is true if the publication exceeds its scope.[39] Arguably, an employer who acts with malice and

---

32. *Id.*
33. *Id.* § 41-1-65(B) to (C).
34. *Id.* § 41-1-65(D).
35. 233 S.C. 567, 106 S.E.2d 258 (1958).
36. *Id.* at 577, 106 S.E.2d at 263.
37. *See* Constant v. Spartanburg Steel Prods., Inc., 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994) ("The publisher must not wander beyond the scope of the occasion."); Conwell v. Spur Oil Co., 240 S.C. 170, 179, 125 S.E.2d 270, 275 (1962) (noting that a qualified privilege may be defeated by the manner of its exercise, even when the publisher believes that the communication is true); Fulton v. Atlantic Coast Line R. Co., 220 S.C. 287, 297, 67 S.E.2d 425, 429 (1951) (opining that the privilege is destroyed when the communication "goes beyond what the occasion demands").
38. *See Constant*, 316 S.C. at 89, 447 S.E.2d at 196 ("One publishing under a qualified privilege is liable upon the proof of actual malice.").
39. *See supra* note 37 and accompanying text.

yet complies with the terms of the statute could still be liable, given the "unless otherwise provided by law" language. At common law, employees may have a cause of action for defamation when an employer maliciously reveals true information, whereas the statute only abrogates false communications. Thus, the statute may provide employers greater immunity than that available at common law. Undoubtedly, allegedly wronged employees will claim that common law should supersede when the employer would be liable but for the statutory immunity. Although this argument is logical given the "unless otherwise provided by law" language, it is inconsistent with the policy behind the statute's passage; the statute was enacted to provide employers with a safe harbor when providing employment references.

## IV. COMMON-LAW DEFAMATION

### *A. Definition*

Common-law defamation is defined as a false communication with a defamatory meaning, published with actual or implied malice, by the defendant, concerning the plaintiff, and resulting in general or special damages.[40] A defamatory communication may be expressed either orally or in writing.[41] A communication is defamatory if it tends

> "to impeach the honesty or integrity or reputation, or publish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or obloquy, or to cause him to be shunned or avoided, or to injure him in his office, business, or occupation."[42]

For a communication to be defamatory, it must be made with malice[43] or exceed the scope of its purpose. Malice may be either actual or implied.[44] Malice is implied when the communication is actionable per se.[45] To show actual malice (common law), a plaintiff must establish that the defendant acted "'with ill-will towards the plaintiff, or that it acted recklessly or wantonly, meaning with conscious indifference toward plaintiff's rights.'"[46]

---

40. *See generally* F. PATRICK HUBBARD & ROBERT L. FELIX, THE SOUTH CAROLINA LAW OF TORTS 459-511 (2d. ed. 1997) (discussing common-law defamation).

41. Haggard & Floyd, *supra* note 5, at 11.

42. Smith v. Bradstreet Co., 63 S.C. 525, 530, 41 S.E. 763, 764 (1902) (quoting State v. Brock, 61 S.C. 141, 151, 39 S.E. 359, 362 (1901)).

43. *See* HUBBARD & FELIX, *supra* note 40, at 466-468.

44. *See id.*

45. *Cf.* Haggard & Floyd, *supra* note 5, at 13.

46. Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982) (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958)).

*B. Defenses*

Several defenses are available to employers that find themselves defendants in defamation actions. An employer can assert truth, employee consent, the First Amendment, or an absolute or qualified privilege.[47] Truth is an absolute defense to a charge of defamation.[48] The defendant, however, bears the difficult burden of proving that an allegedly defamatory statement was substantially true.[49] Because the circumstances surrounding an allegedly defamatory message are usually in dispute, it is difficult for an employer to show that the statements are actually true. Consent is also an absolute defense—as long as it is voluntarily given.[50] Unless the plaintiff is a public official, public figure, or seeking to obtain punitive damages, First Amendment constitutional protections rarely apply to cases involving employment references.[51]

In many employment cases, employers defend on the basis of qualified privilege.[52] Qualified privilege should be distinguished from an absolute privilege. If an employer enjoys an absolute privilege, then an action for defamation will fail even if the communication was false and malicious.[53] "Within the employment context, employers enjoy an absolute privilege in making statements before quasi-judicial boards such as those addressing unemployment, workers' compensation, and grievance disputes."[54] However, this is a narrow class of communications and issues of qualified privilege more often arise in the employment context because of the doctrine's broader applicability.

South Carolina has not directly addressed the issue of qualified privilege and

---

47. *See* Haggard & Floyd, *supra* note 5, at 14-16 (discussing the defenses to defamation).

48. Parker v. Evening Post Publ'g Co., 317 S.C. 236, 245, 452 S.E.2d 640, 645 (Ct. App. 1994).

49. *Id.*

50. *See* Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 229, 317 S.E.2d 748, 754 (Ct. App. 1984).

51. *See* Adler & Peirce, *supra* note 12, at 1405-07.

52. *See* Haggard & Floyd *supra* note 5, at 14-16. Section 595 of the Second Restatement of Torts describes a qualified privilege in the following manner:

> (1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the recipient or a third person, and
>
> (b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.
>
> (2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that
>
> (a) the publication is made in response to a request rather than volunteered by the publisher or
>
> (b) a family or other relationship exists between the parties.

RESTATEMENT (SECOND) OF TORTS § 595 (1979).

53. Alder & Peirce, *supra* note 12, at 1404.

54. *Id.* at 1404-05.

its application to employment references.[55] However, the South Carolina Court of Appeals has indicated that employers have a qualified privilege to publish information when both parties have a legitimate interest in the communication.[56] "'The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty . . . .'"[57] A communication, therefore, is subject to a qualified privilege if it is made "in good faith on any subject matter in which the person communicating has an interest or duty . . . [and is] made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable."[58] A qualified privilege can be defeated by a showing of actual malice.[59] A qualified privilege can also be defeated if it exceeds the scope of its purpose.[60] Thus, both malice and scope may operate to defeat a qualified privilege. However, the Fourth Circuit Court of Appeals, created some confusion on this issue in *Austin v. Torrington Co.*[61] In *Austin* the plaintiffs attempted to show malice by establishing that their former employer told a prospective employer that the former employer could not recommend the plaintiffs for employment.[62] The Fourth Circuit apparently agreed with the district court that the employment relationship established a serious, common interest between the parties and that a qualified privilege existed.[63] Supposedly basing its decision on South Carolina law, the court held that a qualified privilege could only be defeated upon a showing of malice, regardless of evidence that the communication exceeded its scope.[64] The court opined that even if the communication "went beyond a simple statement of non-recommendation for employment," the plaintiffs still retained the burden of proving actual malice.[65] The Fourth Circuit concluded that "given a qualified privilege, there must be proof of

---

55. Sarah B. Boucher, *Job References: Title VII Joins Defamation as Employer Concern in South Carolina*, S.C. LAW., May/June 1997, at 32, 35.

56. Wright v. Sparrow, 298 S.C. 469, 474, 381 S.E.2d 503, 506 (Ct. App. 1989) ("There is a basis for applying a qualified privilege to situations in which an employee's job performance is properly evaluated.").

57. Bell v. Evening Post Publ'g Co., 318 S.C. 558, 561, 459 S.E.2d 315, 317 (Ct. App. 1995) (quoting Prentiss v. Nationwide Mut. Ins. Co., 256 S.C. 141, 147, 181 S.E.2d 325, 327 (1971)).

58. Constant v. Spartanburg Steel Prods., Inc., 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994).

59. *See id.* ("One publishing under a qualified privilege is liable upon the proof of actual malice."); Cullum v. Dun & Bradstreet, Inc., 228 S.C. 384, 388, 90 S.E.2d 370, 372 (1955) ("A communication . . . qualifiedly privileged is not actionable . . . unless malice in fact be shown.").

60. Fulton v. Atlantic Coast Line R. Co., 220 S.C. 287, 297, 67 S.E.2d 425, 429 (1951). A communication exceeds its proper scope if it "goes beyond what the occasion demands [should be published], and is unnecessarily defamatory." *Id.* at 297, 67 S.E.2d at 429; *see also* Abofreka v. Alston Tobacco Co., 288 S.C. 122, 126, 341 S.E.2d 622, 625 (1986) (opining that a qualified privilege is lost if the disclosure exceeds the scope of its purpose).

61. 810 F.2d 416 (4th Cir. 1987).

62. *Id.* at 419.

63. *Id.* at 423-24.

64. *Id.* at 424-25.

65. *Id.* at 424.

*malice in fact.*"[66]

South Carolina courts have not directly addressed the holding in *Austin.* However, South Carolina defamation law appears to draw on definitions of both exessive scope and malice to determine if a qualified privilege has been defeated.[67] The South Carolina Supreme Court has concluded that "[t]he time, place, and other circumstances of the preparation and publication of defamatory charges, as well as the language of the publication itself, are admissible evidence to show that the false charge was made with malice."[68] In essence, the concept of scope has been folded into the definition of malice. If a communication exceeds its proper scope, it often follows that the publisher did so out of malice. As a result, whether a defendant acts with actual malice or publishes a communication that exceeds its proper scope, the qualified privilege will probably fail.[69]

## V. DEFAMATION LAW AND THE EMPLOYER IMMUNITY STATUTE

The South Carolina employer immunity statute does not protect an employer who "knowingly or recklessly releases or discloses false information."[70] As a result, the safe harbor provided by the statute is qualified, rather than absolute. Arguably, however, this was not the intent of the General Assembly. The statute's original caption purported to grant "employers immunity, both absolute and qualified depending on the scope of the information, for responding to prospective employers' requests for references."[71] In a proposed draft of the employer immunity statute, employers were granted absolute immunity for disclosing an employee's dates of employment, pay level, job description, and wage history as well as for disclosing certain written information.[72] However, subsections (B) and (C), as enacted, both seem subject to a qualified privilege, given the limitations set forth in subsection (D). Arguably, the language in subsection (D) refers to actual malice and not scope because the common-law definition of actual malice is substantially similar to the language in the employer immunity statute in subsection (D).[73]

---

66. *Id.* at 425. In essence, the court held that although the communication exceeded its scope, a qualified privilege could only be defeated upon a showing of actual malice as well. *See id.*

67. *See* Constant v. Spartanburg Steel Prods., Inc., 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994) (reasoning that an employer's qualified privilege can be defeated by a showing of malice and that malice may be established by proving that the employer acted recklessly and with conscious disregard for the employee's rights); *see also* Moshtaghi v. Citadel, 314 S.C. 316, 324, 443 S.E.2d 915, 920 (Ct. App. 1994) ("The employer-employee privilege does not protect unnecessary defamation.").

68. Fulton v. Atlantic Coast Line R. Co., 220 S.C. 287, 296, 67 S.E.2d 425, 429 (1951).

69. *See supra* note 67 and accompanying text.

70. S.C. CODE ANN. § 41-1-65(D) (Law. Co-op. Supp. 1997).

71. S. 1041, 111th Gen. Assembly, 2d Sess. (S.C. 1996).

72. *Id.* ("[A]n employer who discloses information about a current or former employee to a prospective employer of the employee shall be absolutely immune from civil liability. The immunity applies only to disclosure of the following: (1) date of employment; (2) pay level; (3) job description and duties, and (4) wage history.").

73. *Compare* Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982) ("Actual malice

If the statutory language in subsection (D) only refers to malice, not scope, then the statute may provide employers more protection than that available at common law. Furthermore, the terms set out in subsections (B) and (C) are prefaced by the words "[u]nless otherwise provided by law."[74] Should a court determine that common-law defamation principles are incorporated by that phrase, then any additional protection granted to employers by the statute could be undercut because common-law causes of action would still be available. On the other hand, should a court hold that when employers abide by the statute's terms the statute supplants common law, employees' recourse to common-law would be barred. Thus, the statute could provide employers more protection than previously available. However, because the scope of the communication protected by statute is limited in content and form and is only publishable to prospective employers, the communications sanctioned by the statute would probably be subject to a qualified privilege at common law anyway. As a result, any additional protection granted by the statute, with reference to the scope of the communication, could be largely illusory.

Although unlikely, a court might interpret the statute as completely supplanting common-law defamation principles in the context of employment references. As a result, the most important question raised by the employer immunity statute is whether the statute is intended to supplant the common law. Unlike a number of other state statutes providing employer immunity,[75] the South Carolina employer immunity statute does not clearly state whether it supplants all relevant common law.[76] Perhaps the statute should be interpreted as supplanting the common law only when an employer complies with its terms; however, when an employer fails to comply with the statutory terms, common-law principles of defamation and privilege should continue to apply. If the employer immunity statute is interpreted as entirely supplanting the common law, employers may continue to implement and follow "no comment" policies because of the statute's cumbersome restrictions[77] and the limited value of the information employers are able to provide in a reasonable amount of time. Such a result would be directly at odds with the intent of the statute to provide employers "immunity from liability for disclosure of information."[78] Statutes should be read so that they comport with the legislature's

---

means that [the defendant] acted 'with ill-will towards the plaintiff, or that [the defendant] acted recklessly or wantonly, meaning with conscious indifference toward plaintiff's rights.'" (quoting Rogers v. Florence Printing Co., 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958))), *with* S.C. CODE ANN. § 41-1-65(D) ("This protection and immunity shall not apply where an employer knowingly or recklessly releases or discloses false information.").

74. S.C. CODE ANN. § 41-1-65(B) to (C) (Law. Co-op. Supp. 1997).

75. *See infra* text accompanying note 83.

76. The statute uses the ambiguous phrase "unless otherwise provided by law." *See supra* text accompanying notes 33-39.

77. *See supra* text accompanying notes 23-32.

78. S.C. CODE ANN. § 41-1-65 (Law. Co-op. Supp. 1997). *But see* S.C. CODE ANN. § 2-13-175 (Law. Co-op. Supp. 1997) (mandating that headings or captions used to introduce code sections cannot

intent.[79] Specifically, "[t]he policy and purpose of the entire Act have to be considered and . . . the real purpose and intent of the lawmakers will prevail over the literal import of the words."[80] Additionally, South Carolina law provides that "statutes in derogation of common law rights are strictly construed and not extended in application thereof beyond the clear legislative intent."[81] Section 41-1-65 may limit the common-law qualified privilege afforded to employers that provide employment references in good faith by narrowly confining employer immunity to the terms of subsections (B) and (C). As a result, the employer immunity statute should be strictly construed so that it does not supplant common-law principles unless an employer takes advantage of the safe harbor provided by the statute's terms. This reading of the statute would allow employers to take advantage of common-law defenses when they do not come within the coverage of the employer immunity statute.

## VI. CONCLUSION AND RECOMMENDATION

The South Carolina employer immunity statute seemingly provides a safe harbor for employers that abide by its terms. Unfortunately, the statute's relationship to common-law defamation is unclear. The statute may be interpreted as actually providing less protection than that available at common law and, at most, providing immunity equal to that of the common law. Moreover, compliance with the terms of the statute is both time-consuming and largely ineffective in providing prospective employers with timely and informative employment references. Specifically, employers generally fill immediate hiring needs, and written requests for information take longer to process than oral requests. The statute, however, only provides conditional immunity for limited oral disclosures—dates of employment and wage information. Consequently, employers that provide substantive information about an employee's job performance over the phone, or in person, are not protected by the statute. Prospective employers that need more information than is available under subsection (B), must comply with the written request mandates of subsection (C).

The employer immunity statute could be improved in two respects. First, the language "unless otherwise provided by law" should be clarified. For example, Maine's employer immunity statute specifically provides that it "is supplemental to and not in derogation of any claims available to the former employee that exist under state law and any protections that are already afforded employers under state law."[82] Thus, unlike the South Carolina employer immunity statute, Maine's statute specifically sets forth how it relates to other state laws. Second, South Carolina's

---

be used to narrow or broaden the text of the actual code section).

79. Gunnels v. American Liberty Ins. Co., 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968).

80. *Id.*

81. Crowder v. Carroll, 251 S.C. 192, 199, 161 S.E.2d 235, 238 (1968).

82. ME. REV. STAT. ANN. tit. 26, § 598 (West Supp. 1997).

employer immunity statute should grant absolute, rather than qualified, immunity for the proper disclosure of information as defined in subsections (B) and (C).[83] Absolute immunity would provide employers with a true safe harbor as opposed to merely providing employers with a qualified privilege—a privilege already afforded by common law. Instead, a qualified privilege should only apply when employers step outside the statutory safe harbor. In this manner, the statute would provide a truly safe harbor for employers that comply with its terms and still keep intact common-law defamation principles to regulate employer liability when the employer exceeds the statutory terms for immunity.

*Sandi R. Wilson*

83. Some state statutes currently provide absolute immunity for certain disclosures. *See, e.g.*, KAN. STAT. ANN. § 44-119a (Supp. 1996) (providing absolute immunity for disclosures about dates of employment, wages, job descriptions, duties, wage histories, written evaluations, and whether an employee was fired and why).